

MESA PETROLEUM CO.

IBLA 78-36 Decided September 28, 1978

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting upland oil and gas competitive lease bids NM 33002, NM 33004, and NM 33006.

Affirmed.

1. Oil and Gas Leases: Competitive Leases--Regulations: Waiver

The failure of a high bidder, in an upland competitive lease sale, to submit one-fifth of the amount bid with his bid in the proper form of remittance, may not be waived where the bidder submitted a sight draft, and thus retained control of the fund until presentment and final payment.

2. Estoppel

Where the bidder may have understood from BLM that a bank draft was an acceptable form of remittance but submitted a sight draft, there is no basis for estoppel.

APPEARANCES: Barry F. Cannaday, Esq., Amarillo, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

At an upland competitive oil and gas lease sale held on February 21, 1978, in the New Mexico State Office, Bureau of Land Management, appellant was declared the high bidder for parcels Nos. 5, 6, and 7, NM 33002, NM 33004, and NM 33006, respectively. In a decision on March 14, 1978, the State Office rejected appellant's bids on the ground that appellant had not submitted one-fifth of the total amount bid in cash, or by cashier's check, certified check, or money order as required by 43 CFR 3120.1-4(b).

Appellant refers to the remittances submitted by it as bank drafts. In its statement of reasons appellant states that it followed the instructions on the reverse side of the Bid Form 3000-2,

which BLM provided, and that its assistant manager later called the State Office to insure that the bank draft would be acceptable. Appellant states that after it was declared high bidder, BLM personnel for the first time indicated the remittances were unacceptable. Accordingly, on March 8, 1978, it forwarded cashier's checks to BLM to be substituted for the drafts. These were received by BLM and negotiated, with no refund having been made to appellant. Appellant contends the BLM decision should be overturned on two grounds. It argues that the defect in the form of remittance resulted in no prejudice to BLM or to the orderly process of Federal oil and gas leasing and should be waived. It also asserts that BLM is estopped by the actions of its employees in informing it that a bank draft would be accepted.

While appellant refers to the remittances originally submitted as bank drafts, this appellation is incorrect. Appellant submitted sight drafts. A bank draft is a check drawn by one bank on another. 2 Anderson, Uniform Commercial Code 612 (2d ed. 1971). The instruments submitted by appellant, unlike those referred to in the regulation, 43 CFR 3120.1-4(b), the bid form, and the notice of sale, do not, of themselves, commit any particular funds to payment of the debt. Upon presentment of a sight draft for deposit, the bank presented with the instrument takes it for collection, but credits no amount to the payee's account until it collects from the drawee.

There is reason for some confusion concerning what form of remittance will be acceptable because there are differences in the various instructions issued by BLM. Instructions on the bid form read: "Bids must be accompanied by one-fifth for Oil and Gas Lease and one-half for Geothermal Resources Lease of total amount bid. The amount should be cash or money order, certified or cashier's check or bank draft which must be made payable to the Bureau of Land Management."

The notice of the oil and gas lease sale states: "Bidders must submit with each bid one-fifth of the total amount bid in cash or by cashier's check, certified check, or money order payable to the order of the Bureau of Land Management * * *."

Regulation 43 CFR 3120.1-4(b) states that the bidder "must submit with his bid the following: Certified check on a solvent bank, money order, or cash, for one-fifth of the amount bid by him." The regulation allows neither bank drafts nor cashier's checks. The Bid form allows both, whereas the sale notice refers to cashier's checks but not to bank drafts. Nowhere in all this confusion is a sight draft mentioned.

For further comparison we note that regulation 43 CFR 1822.1-2, dealing with forms of remittances generally, provides:

- (a) Subject to the condition set forth in paragraph (b) of this section, forms of remittances that

will be accepted in payment of fees, rentals, purchase price, and other charges required by the regulations in this chapter include cash and currency of the United States and checks, money orders, and bank drafts made payable to the Bureau of Land Management. Checks or drafts are accepted subject to collection and final payment without cost to the Government office.

(b) Personal checks are an acceptable form of remittance except where the regulations in this chapter specifically provide otherwise.

The various instructions given by BLM are proper under this general regulation, but list forms of remittance in addition to those specifically designated in 43 CFR 3120.1-4(b). That regulation, being a more specific instruction than the general regulation, is controlling.

[1] The issue here is whether the failure of a high bidder, in an upland competitive lease sale, to submit one-fifth of the amount bid with his bid in the proper form of remittance, may be waived where the bidder submitted a sight draft and thus retained control of the fund until presentment and final payment. Appellant requests that this defect be waived because it relied on information supplied by BLM and there was no question raised that the instruments submitted "would have been accepted and paid."

While 43 CFR 3120.1-4(b) is couched in mandatory terms, a failure to comply fully with its requirements may not necessarily require rejection of the offer. In competitive lease offers, where price, rather than priority of filing as in noncompetitive lease offers, is the primary criterion, some deviations from mandatory regulatory requirements, such as a failure to submit a statement of citizenship, or of corporate qualifications, have been held to be waivable defects. Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, B.E.S.T., Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976); Silver Monument Minerals, Inc., 14 IBLA 137 (1974); North American Coal Corp., 74 I.D. 209 (1967).

The criteria used to decide whether a requirement can be waived have been whether the default gives one bidder an advantage over another, or is destructive to the orderly conduct of lease sales. The essence of the cases is a concern for the fairness to all interested parties and the reasonable consequences of the action.

We are unaware of any decision waiving the requirement that the full amount of the bid deposit be properly tendered. In Sarkey's Inc., 26 IBLA 141 (1976), the Board ruled that submission of one-fifth of the amount bid is mandatory. There the bidder had used the wrong figures in computing the bonus and had submitted less than half the amount required. In refusing to waive the defect, the Board found

that waiver "would be so prejudicial to the conduct of lease sales that it cannot be permitted." 26 IBLA at 143. If the high bidder could withhold substantial amounts of the required deposit without risk of his offer being rejected, he would gain a considerable advantage over other bidders. North American Coal Corp., *supra* at 211.

By submitting sight drafts for the bid deposit, appellant retained use and control of its funds until the drafts were accepted and paid. Other bidders lost control of their money upon submitting their bids. This gave appellant an unfair advantage over other bidders; therefore, the defect in the form of remittance cannot be waived.

[2] Appellant asserts that "[t]he BLM is estopped by the actions of its agents and employees from asserting that the one-fifth bonus was not properly tendered with Mesa's bids." Even assuming *arguendo* that estoppel could be invoked in this type of situation, where the bidder may have understood from BLM that a bank draft was an acceptable form of remittance but submitted a sight draft, there is no basis for estoppel.

Appellant's telephone call to verify that its remittance was in acceptable form was not sufficient. Appellant apparently was mistaken as to the form of its remittance and called it a bank draft. BLM cannot be held accountable for appellant's error. There can be no detrimental reliance on a misstatement by BLM officials. Therefore, the essential ingredients for any application of estoppel are lacking here; namely, a misrepresentation upon which a person relies to his detriment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

